

WC 03-242

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November 14, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

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VIA HAND DELIVERY

NOV 14 2003

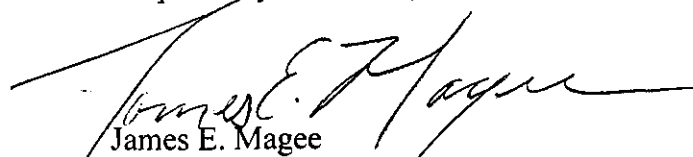
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Petition of Northland Networks, Ltd. Pursuant to §252(e)(5) of the
Communications Act for Expedited Pre-emption of the Jurisdiction of the
New York State Public Service Commission Regarding Interpretation and
Enforcement of an Interconnection Agreement

Dear Ms. Dortch:

On behalf of Northland Networks, Ltd., enclosed please find an original and four
(4) copies of the above-referenced petition. In the event you have any questions, or require
further information, please contact the undersigned at (703) 356-7500.

Respectfully submitted,


James E. Magee
Counsel for Northland Networks, Ltd.

Enclosures

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NOV 14 2003

**Before the
Federal Communications Commission
Washington, D.C. 20554**

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Petition of Northland Networks, Ltd., Pursuant to §252(e)(5))
of the Communications Act for Expedited Pre-emption of the) WC Docket No. 03-
Jurisdiction of the New York State Public Service Commission)
Regarding Interpretation and Enforcement of an Interconnection)
Agreement)

**PETITION OF NORTHLAND NETWORKS, LTD.
FOR PRE-EMPTION**

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Dated: Albany, New York
November 14, 2003

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Petition of Northland Networks, Ltd., Pursuant to §252(e)(5))
of the Communications Act for Expedited Pre-emption of the) WC Docket No. 03-
Jurisdiction of the New York State Public Service Commission)
Regarding Interpretation and Enforcement of an Interconnection)
Agreement)

**PETITION OF NORTHLAND NETWORKS, LTD.
FOR PRE-EMPTION**

Northland Networks, Ltd. (Northland) through its attorneys, pursuant to §252(e)(5) of the Telecommunications Act of 1996, and §1.803 of the Rules of this Commission, respectfully petitions the Commission to pre-empt, on an expedited basis, the jurisdiction of the New York State Public Service Commission to interpret and enforce the interconnection agreement between Northland and Verizon New York Inc. (Verizon), with respect to determining payment of reciprocal compensation. (Documents cited in this Petition are included as exhibits to the attached affidavit of Keith J. Roland made in support of the facts set forth herein.)

I. The Parties

Northland is a New York corporation with principal offices in Utica, New York. It was issued a Certificate of Public Convenience and Necessity by the New York State Public

Service Commission ("PSC") on December 12, 1994, in Case 94-C-0381. That Certificate authorized Northland to operate as a facilities-based common carrier, including the provision of residential and business local exchange service.

Verizon is an Incumbent Local Exchange Carrier providing local exchange service in large areas of the State of New York, including territories surrounding Utica, New York, in which Northland also provides service.

Northland and Verizon (then known as Bell Atlantic-New York) executed an interconnection agreement dated as of April 1, 1999. That agreement was an adoption of the existing interconnection agreement between ACC National Telecom Corp. and Bell Atlantic, dated as of November 11, 1997 (referred to herein as the "Base Agreement"). The Northland/Bell Atlantic interconnection agreement was approved by the PSC in a single commissioner order issued in Case 99-C-0657 on August 11, 1999, and confirmed by the full PSC in an order issued on August 20, 1999.

The Base Agreement, which became the interconnection agreement between Northland and Verizon, contains reciprocal compensation and change of law provisions.

By its own terms, the original interconnection agreement between Northland and Verizon remains in effect.

II. Background Of The Dispute

This case began with a dispute between Northland and Verizon regarding the reciprocal compensation rate to be paid by Verizon for internet traffic delivery by Verizon to Northland. Verizon asserted the interconnection agreement allowed it to pay the rate set forth in

the Commission's ISP Remand Order.¹ Northland insisted that, absent an amendment to the interconnection agreement, the rates set forth in Verizon's state tariff, incorporated by reference into the interconnection agreement, would prevail.

Beginning in mid-2001, rather than paying the rate for reciprocal compensation set forth in the agreement, or in the PSC tariffs which were incorporated by reference into the agreement, Verizon unilaterally began paying reciprocal compensation to Northland at the lower rate Verizon alleged was correct under the ISP Remand Order. The difference between those two rates, which Northland argued was owed to it by Verizon, continued to grow.

Northland disagreed with Verizon's claims, and believed the specific terms of its interconnection agreement with Verizon required Verizon to continue paying the rate for reciprocal compensation contained in Verizon's PSC 914 Tariff, which had been incorporated by reference into the interconnection agreement. Furthermore, Northland took the position that, even if the ISP Remand Order did constitute a change of law, such change would only be effective following the execution and approval by the PSC of an amendment to the interconnection agreement, and that a rate change could be prospective only as of the date the amendment was approved by the PSC.

The parties were unable to negotiate a resolution of the dispute.

Northland's disagreement with Verizon over the correct rate for reciprocal

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic, CC Dockets Nos. 96-98 and 99-68, FCC 01-131, Order on Remand and Report and Order, April 27, 2001.

compensation, and whether an amendment to the interconnection agreement was necessary or proper, lead to Verizon's filing a Petition with the PSC on April 29, 2002. Therein, Verizon argued, as it had in five similar PSC complaints filed against other CLECs, that Northland was obligated to adopt amendments to the interconnection agreement, and that such amendments would be effective retroactive to June 14, 2001. Verizon also argued that the existing interconnection agreement automatically incorporated the intercarrier compensation regime specified in the ISP Remand Order, and that the ISP Remand Order constituted a change of law triggering an obligation to amend the agreement under paragraph 34.0, which provides that the agreement:

[I]s subject to change or modification as may be required by a regulatory authority or court in the exercise of its lawful jurisdiction or as may be required by either Party based on any significant change in FCC or PSC rules which may impact the provision of Unbundled Network Elements, Wholesale Services and other facilities and services provided under this Agreement or the rights and obligations of the Parties under the Act. The Parties shall use best efforts to negotiate in good faith revisions to this Agreement to incorporate any changes or modifications as may be required under this sub-section.

In its PSC filing, Verizon urged the PSC to "expeditiously issue an order declaring that the interim rate regime established in [the ISP Remand Order] was implemented under the terms of Agreement [referring to the Northland/Verizon Interconnection Agreement] as of June 14, 2001." Alternatively, Verizon asked the PSC "to expeditiously issue an order approving Verizon's proposed amendment to the Agreement." Furthermore, Verizon asked, to the extent it had paid Northland for internet-bound traffic at a level higher than Verizon alleged was required by the ISP Remand Order, for any period after June 14, 2001, that Northland be required to

promptly return the difference between those rates.

However, in this general timeframe, the PSC adopted an internal policy to the effect that it would not devote its resources to resolving disputes between carriers requiring an interpretation of interconnection agreements regarding reciprocal compensation. Verizon was informally notified of the Commission's position. On July 10, 2002, Verizon wrote a letter to the Secretary of the PSC stating "[a]fter discussions with Staff Counsel, it is Verizon's understanding that the Commission has declined to address these six petitions and that, therefore, Verizon should withdraw them. Based on this understanding, Verizon hereby withdraws its petitions in [the six designated cases, including Case 02-C-0550, the number assigned to the Verizon complaint against Northland]."

On August 7, 2002, the Secretary of the PSC wrote to Verizon accepting withdrawal of the Verizon complaints. The Secretary's letter went on to state "[t]his letter also confirms that because adequate, alternative forums exist, the Department will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic."

The PSC has not changed its position, and accordingly, the dispute between Northland and Verizon regarding payment of reciprocal compensation has never been, and will not be, resolved by the PSC.

III. The Relief Requested Parallels That Previously Granted By This Commission In Comparable Circumstances

Northland asks this Commission to pre-empt the jurisdiction of the New York

PSC over this interconnection dispute, and to resolve the dispute between Northland and Verizon, including determining, and requiring payment of, the amounts owed by Verizon to Northland.²

The request for pre-emption from Northland seeks the same relief which this Commission has granted to three other New York CLECs in identical circumstances.

MCImetro Access Transmission Services LLC ("MCImetro") was one of the other CLECs subject to a Verizon complaint to the PSC, which asked the PSC to award to Verizon the same relief against MCImetro which Verizon sought against Northland. The PSC declined to entertain Verizon's complaint against MCImetro for the same reasons it declined to accept Verizon's complaint against Northland. Accordingly, on September 6, 2002, MCImetro filed a petition with this Commission asking for expedited pre-emption of the jurisdiction of the PSC regarding interpretation and enforcement of its interconnection agreement, which was comparable to the agreement between Northland and Verizon. MCImetro's petition cited the same disagreement between MCImetro and Verizon regarding payment of reciprocal compensation for internet traffic which exists between Northland and Verizon.

On November 26, 2002, this Commission issued its "Memorandum, Opinion and Order" in CC Docket 02-283, which granted the request for pre-emption. In that Order, the

² This Commission recently granted a CLEC's request that an ILEC be ordered to pay past due reciprocal compensation. In the Matter of Starpower Communications, LLC v. Verizon South Inc., Memorandum, Opinion and Order, File EB-00-MD-19, FCC 03-278, November 7, 2003.

Commission determined that the August 7, 2002, letter from the Secretary of the PSC, referenced above, established that the PSC had failed to act on the interconnection dispute, and therefore required pre-emption under Section 252(e)(5).

Another petition for pre-emption of the PSC was filed with this Commission by MCI WorldCom Communications, Inc. ("MCI WorldCom") and Brooks Fiber Communications of New York, Inc. ("Brooks Fiber") (together with Verizon New York) on March 20, 2003. Therein, the petitioners asked the FCC to resolve the same issue which Northland now has with Verizon: "Did the interconnection agreements in effect between MCI WorldCom and Verizon, and between Brooks Fiber and Verizon, automatically incorporate the internet pricing regime set forth in the FCC's ISP Remand Order?"

The FCC's determination on that issue will directly impact on Northland, since both MCI WorldCom and Brooks Fiber had adopted the same base agreement as Northland, i.e. the pre-existing agreement between Verizon and ACC National Telecom Corp. executed in 1997.

On May 7, 2003, the Commission issued a Memorandum, Opinion and Order in CC Docket 03-81 which granted the Joint Petition of MCI WorldCom, Brooks Fiber and Verizon to pre-empt the jurisdiction of the PSC. Therein, the Commission specifically agreed to resolve the issue of whether the interconnection agreements automatically incorporate the inter-carrier compensation regime of the ISP Remand Order as of its effective date, without requiring further action by the parties.

Northland is not aware of any decision having been issued by this Commission on the merits of the formal complaints submitted by MCImetro, MCI WorldCom, or Brooks Fiber following the Commission's pre-emption of the PSC.

IV. Northland's Petition For Pre-emption Should Be Granted

Because the PSC has refused to interpret and enforce the agreement between Northland and Verizon, pre-emption of the PSC would be consistent with the requirements of Sections 251 and 252(e)(5) of the Telecom Act.

The Telecom Act is clear. Section 252(e)(5) requires this Commission to pre-empt the jurisdiction of a state commission in any proceeding or matter in which the State Commission "fails to act to carry out its responsibility" under Section 252. Section 252(e)(5) provides:

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order pre-empting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

As indicated, this Commission has twice already pre-empted the jurisdiction of the PSC in the same circumstances as exist with respect to the Northland/Verizon dispute over payment of reciprocal compensation.

V. Issues To Be Resolved By This Commission

Northland asks this Commission to pre-empt the jurisdiction of the PSC to resolve the following issues:

- (1) For the period beginning on June 14, 2001, did the interconnection agreement between Northland and Verizon automatically incorporate the inter-carrier compensation regime of the ISP Remand Order as of the effective date of that Order, without requiring further action by the parties?
- (2) Did the ISP Remand Order constitute a change of law, under paragraph 34.0 of the interconnection agreement, which triggered an obligation to amend the agreement in order to incorporate the inter-carrier compensation regime of the ISP Remand Order?
- (3) If the ISP Remand Order constituted a change of law under paragraph 34.0, would the compensation regime become effective as of June 14, 2001; on the date the parties executed an amendment to the interconnection agreement; or on some other date?
- (4) Since the parties have not executed an amendment to their interconnection agreement, and since Verizon has not pursued its effort to require Northland to execute such an amendment, has Northland been entitled to receive the reciprocal compensation rate set forth in Verizon's PSC 914 Tariff (which is incorporated by reference into the interconnection agreement)?

VI. Expedited Treatment Is Appropriate

In light of the Commission's two earlier pre-emptions of the PSC in circumstances identical to those now posed by the dispute between Northland and Verizon, and in light of the PSC's unaltered policy of refusing to interpret or enforce provisions of interconnection agreements dealing with reciprocal compensation, this Commission should expeditiously issue an order granting the requested pre-emption.

Northland had anticipated a determination by this Commission in the MCI WorldCom, MCImetro or Brooks Fiber complaints against Verizon, on the same issue, would obviate the need for Northland to file its own complaint. However, since no determination has been issued to date by the Commission in those disputes, in order to prevent any unfair prejudice

to Northland, pre-emption should be granted expeditiously so that a formal complaint from Northland raising the same issues as had been contained in those earlier complaints may be filed.

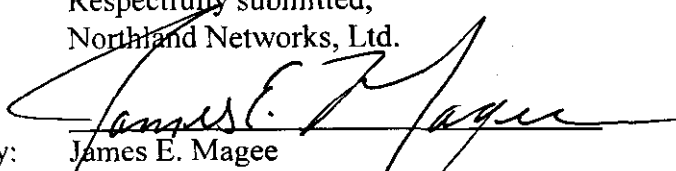
To the extent Verizon continues to pay reciprocal compensation to Northland at a rate lower than that to which Northland believes it is entitled, Northland will suffer economic injury until a determination is issued by this Commission.

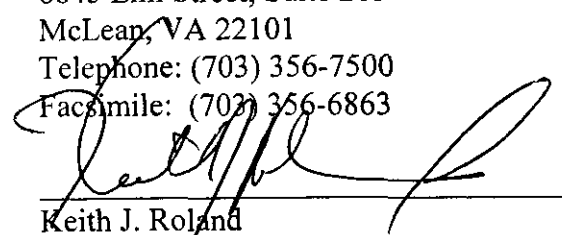
VII. Conclusion

For the reasons set forth herein, Northland respectfully urges the Commission to expeditiously grant this petition to pre-empt the jurisdiction of the New York PSC over this dispute, and to interpret and enforce the interconnection agreement between the parties. The issues on which pre-emption should be granted are set forth in Section V above.

Respectfully submitted,
Northland Networks, Ltd.

By:


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Dated: Albany, New York
November 14, 2003

Its Attorneys

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3. Northland was issued a Certificate of Public Convenience and Necessity by the New York State Public Service Commission on December 12, 1994, in Case 94-C-0381. That Certificate authorized Northland to operate as a facilities-based common

carrier, including the provision of residential and business local exchange service.

Northland currently provides such service in areas including and surrounding Utica and Syracuse, New York.

4. Verizon New York Inc. (Verizon) is an Incumbent Local Exchange Carrier providing local exchange service in large areas of the State of New York, including territory in and surrounding Utica and Syracuse, New York, in which Northland also provides service.

5. Northland and Verizon (then known as Bell Atlantic-New York) executed an interconnection agreement dated as of April 1, 1999. That agreement was an adoption of the existing interconnection agreement between ACC National Telecom Corp. and Bell Atlantic, dated as of November 11, 1997 (referred to herein as the "Base Agreement"). (See Exhibit 1.) The Northland/Bell Atlantic interconnection agreement was approved by the PSC in a single commissioner order issued in Case 99-C-0657 on August 11, 1999, and confirmed by the full PSC in an order issued on August 20, 1999.

6. The Base Agreement, which became the interconnection agreement between Northland and Verizon, contains reciprocal compensation and change of law provisions.

7. By its own terms, the original interconnection agreement between Northland and Verizon remains in effect.

8. Pursuant to the terms of the interconnection agreement between

Northland and Verizon, Verizon paid reciprocal compensation to Northland at the rates set forth in Verizon's PSC No. 914 (later PSC No. 8) tariff, which was incorporated by reference into the interconnection agreement between the parties.

9. Following issuance of this Commission's April 27, 2001, ISP Remand Order, Verizon asserted to Northland it was entitled to pay Northland reciprocal compensation for internet traffic at the FCC prescribed rate, rather than the higher rate set forth in Verizon's PSC No. 914 (now PSC No. 8) Tariff. Verizon forwarded to Northland a proposed amendment to the interconnection agreement between Northland and Verizon which would specifically adopt language incorporating the rates set forth in the ISP Remand Order. (See Exhibit 2.)

10. On June 28, 2001, Northland replied, in writing, to Verizon, stating it did not agree that the FCC's rate regime for reciprocal compensation on internet traffic was applicable to Northland, and refused to accept Verizon's proposed amendment to the interconnection agreement. (See Exhibit 3.)

11. Nonetheless, beginning at some point in that timeframe, Verizon unilaterally began paying reciprocal compensation to Northland at the rates set forth in the ISP Remand Order, not the rates set forth in Verizon's PSC 914 or PSC 8 Tariff. Northland filed objections to that practice, which were ignored by Verizon.

12. The parties have been unable to negotiate a resolution of their dispute.

13. On April 29, 2002, Verizon filed a petition with the New York State

Public Service Commission (PSC) “for an expedited order declaring that no amendments to its interconnection agreement with Northland Networks, Ltd. is necessary, or alternatively, approving Verizon’s proposed amendment.” (See Exhibit 4.) At about the same time, Verizon filed comparable complaints with the PSC against a number of other CLECs which had also refused to accept Verizon’s proposed amendment to the interconnection agreement.

14. Northland intended to file an opposition to Verizon’s PSC petition. However, Northland was advised by PSC Staff to defer because the PSC was considering not accepting Verizon’s petition. And, in fact, the PSC went on to adopt an internal policy to the effect that it would not devote its resources to resolving disputes between carriers requiring an interpretation of interconnection agreements regarding reciprocal compensation. Verizon was informally notified of the Commission’s position. On July 10, 2002, Verizon wrote a letter to the Secretary of the PSC stating “[a]fter discussions with Staff Counsel, it is Verizon’s understanding that the Commission has declined to address these six petitions and that, therefore, Verizon should withdraw them. Based on this understanding, Verizon hereby withdraws its petitions in [the six designated cases, including Case 02-C-0550, the number assigned to the Verizon complaint against Northland].” (See Exhibit 5.)

15. On August 7, 2002, the Secretary of the PSC wrote to Verizon accepting withdrawal of the Verizon complaints. The Secretary’s letter went on to state

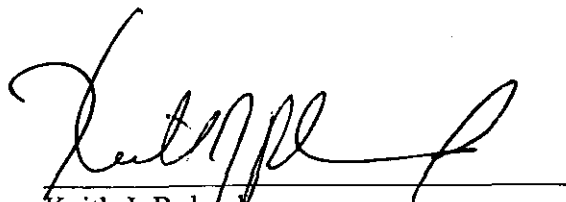
"this letter also confirms that because adequate, alternative forums exist, the Department will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic." (See Exhibit 6.)

16. The open issues between Northland and Verizon in this dispute are as follows:

- (1) For the period beginning on June 14, 2001, did the interconnection agreement between Northland and Verizon automatically incorporate the inter-carrier compensation regime of the ISP Remand Order as of the effective date of that Order, without requiring further action by the parties?
- (2) Did the ISP Remand Order constitute a change of law, under paragraph 34.0 of the interconnection agreement, which triggered an obligation to amend the agreement in order to incorporate the inter-carrier compensation regime of the ISP Remand Order?
- (3) If the ISP Remand Order constituted a change of law under paragraph 34.0, would the compensation regime become effective as of June 14, 2001; on the date the parties executed an amendment to the interconnection agreement; or on some other date?
- (4) Since the parties have not executed an amendment to their interconnection agreement, and since Verizon has not pursued its effort to require Northland to execute such an amendment, has Northland been entitled to receive the reciprocal compensation rate set forth in Verizon's PSC 914 Tariff (which is incorporated by reference into the interconnection agreement)?

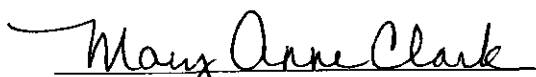
17. Verizon continues to pay reciprocal compensation to Northland at the lower rate specified in the ISP Remand Order, and as a result Northland continues to

suffer significant economic damages.



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Sworn to before me this
13th day of November, 2003


Notary Public

MARY ANNE CLARK
NOTARY PUBLIC, State of New York
No. 4729130
Qualified in Albany County
Commission Expires: 10/31/06

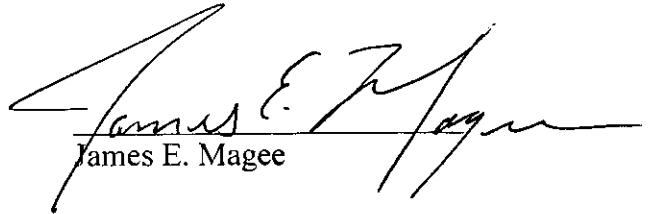
CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2003, a true and correct copy of the forgoing Northland Networks, LTD Petition for Pre-emption was sent by Federal Express overnight delivery to the following persons at the addresses listed below:

Ms. Jaclyn A. Brilling
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Ms. Tamara L. Preiss
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James E. Magee